Supreme Court, U.S.
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85-2097
No. .....

In The

Supreme Court of the United States

October Term, 1986

WEISSER OPTICAL COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Under the National Labor Relations Act (the "NLRA"), 29 U.S.C. § 151 *et seq.*, the presumption of continued majority status accorded an incumbent union may be rebutted by a decertification petition executed by a majority of the represented employees provided that the petition has not been tainted by employer misconduct. The questions presented are (1) in determining whether such a taint exists, is the correct standard that articulated by the Seventh Circuit in this case (did the employer's conduct have "the reasonable tendency to encourage the initiation of the decertification process") or the test established by the Ninth and Fourth Circuits (did the employer's conduct "signficantly contribute to [the] loss of majority or the factors upon which a doubt of such majority is based"); and (2) in determining whether such a taint exists, may the National Labor Relations Board (the "Board") consider as evidence statements protected by Section 8(c) of the NLRA and the First Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

In addition to the parties reflected in the caption, the charging party in the underlying Board proceeding was Local 853, United Optical Workers Union, RWDSU, AFL-CIO (the "Union").

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

—o—

Petitioner Weisser Optical Company* (the "Company" or "Weisser") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on March 25, 1986.

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* Supreme Court Rule 28.1 is not applicable as Weisser has no parent companies, subsidiaries, or affiliates.

OPINION BELOW

The opinion of the Court of Appeals (App. A, A-1) and its order denying the petition for rehearing (App. A, A-52) are not officially reported. The Board's decision and order (App. A, A-11) is reported at 274 N.L.R.B. No. 143.

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JURISDICTION

The judgment of the Court of Appeals (App. A, A-1, A-51) was entered on March 25, 1986. A timely petition for rehearing, with suggestion for rehearing en banc, was denied on May 15, 1986 (App. A, A-52) and this petition for certiorari was filed within ninety days of that date.[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the First Amendment to the United States Constitution and the NLRA are set forth in the Appendix at App. C, C-1.

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[1] Petitioner's motion before the Court of Appeals requesting a thirty day stay of their judgment to permit the filing of this petition was denied on June 9, 1986. (App. A, A-53.) Petitioner thereafter filed a Motion to Stay Execution of Judgment before this Court pursuant to 28 U.S.C. § 2101(f) and Supreme Court Rule 44(c). That motion was denied.

STATEMENT OF THE CASE

The Company operates optical laboratory facilities located in Peoria, Moline, and Arlington Heights, Illinois. During early 1984, these facilities employed approximately twenty-two employees who were represented by the Union. The most recent collective bargaining agreement between Weisser and the Union was a one year agreement which expired on April 30, 1984.

In February 1984, Ken Ratcliff, one of the laboratory employees, contacted the Board to obtain instructions and information about the filing of a decertification petition. Ratcliff subsequently obtained signatures from eighteen of the bargaining unit employees on the requisite showing of interest form[2] and, on February 28, 1984, he filed that form and a decertification petition with the Board. When Weisser subsequently became aware of the petition and the fact that it was supported by a substantial percentage of the unit employees, it declined to negotiate a new agreement with the Union. The basis for the Company's position was that it had a good faith doubt as to the Union's continued majority status and that, until this doubt was resolved by a Board election, bargaining would be improper.

The Board and court below concluded that Weisser could not entertain a legitimate good faith doubt to support its refusal to bargain because the decertification petition

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[2] A decertification petition must be supported by a showing of interest or proof of desire for decertification executed by at least 30 percent of the bargaining unit. Statement of Procedures of the National Labor Relations Board, Sections 101.17 and 101.18.

had been "sufficiently taint[ed]" by employer actions that "reasonably tended to encourage decertification." App. A, A-10. Three events were relied upon to support this conclusion:

1. In 1983, almost one year before the events which gave rise to the present dispute,[3] Weisser's owner, Philip Hirsch, stated to two employees, Ratcliff and Sallie Homan, that "the Union is killing me." Ratcliff assumed that Hirsch was suggesting a decertification effort although decertification was not mentioned during the conversation. Ratcliff also received a pamphlet from co-employee Homan[4] describing the decertification process which included a sample showing of interest form. Thereafter Ratcliff met with other employees and decided not to pursue decertification.

2. A year later employee opinion with respect to decertification had significantly changed. In 1984, as the result of considerable dissatisfaction with the Union, Ratcliff and other employees decided, in their words, to file a decertification petition in order to learn "what options were available" to them without a union.

Sometime prior to January 1984, Homan had been promoted out of the bargaining unit to the first-line super-

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[3] As the court below noted, while these events took place outside of the NLRA's Section 10(b) statutory limitation period and cannot be the basis for any unfair labor practice, they can be considered as "relevant to understanding the subsequent events." App. A, A-3.

[4] The court below, like the Board, mistakenly attributed the pamphlet to Hirsch. App. A, A-3. Ratcliff's uncontradicted testimony, however, was that the pamphlet was given to him by Homan.

visory position of laboratory director. She continued, however, to "shoot the bull" with her two long-time friends and co-workers, Ratcliff and James Menees. During the months of January and February 1984, Ratcliff and Menees regularly visited Homan's office to "talk about anything under the sun." The following incidents over the course of these two months were found to have unlawfully "encouraged" the decertification effort:

- Around the first week of February, Homan mentioned to Ratcliff that "she had gotten a call from Philip [Hirsch] and he said it was getting close to this time." Ratcliff assumed that this remark referred to decertification because he "didn't know what else it would be time for."
- Later in February, Homan asked Ratcliff whether he still had the pamphlet she had given him in 1983. Ratcliff said he thought it was at home and he would look for it and return it.
- The next day Ratcliff told Homan that he "had found it." At Homan's request, Ratcliff left the pamphlet on the desk of David Lloyd, Weisser's comptroller.
- In January 1984, Homan mentioned to Menees "that Philip [Hirsch] had been on her back and was trying to get things started" which Menees "assumed was decertification."
- In February 1984, Homan, in response to Menees' inquiry as to "what was her problem . . . or what was going on because she was pretty down in the dumps that day" stated "that Philip [Hirsch] had been on her again about getting something started." Menees' "impression was that Homan did not desire that the union be decertified" although Hirsch desired that event. App. A, A-4.

3. The Court of Appeals also found that a comment made by Hirsch at a February 24, 1984 meeting of em-

ployees, "that there was no need for a 'third party,' meaning the union, had the tendency to encourage the employees to sign the decertification petition." App. A, A-9.

This remark by Hirsch, made after consultation with his attorney, occurred in the context of an employee meeting that primarily involved the growth and future of the Company. Hirsch concluded the meeting with a statement that everyone had worked together to help the Company solve its problems in 1982 and that he believed the employees were "mature enough that we [the employees] could work out our differences with him and that we didn't require a third party." It is undisputed that there was no discussion of decertification at the meeting nor were any threats or promises made by any Company representative.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Conflict With The Decisions Of Other Courts Of Appeals On The Same Question

The decision below directly conflicts with the opinion issued the same day by the Ninth Circuit in *Hotel, Motel and Restaurant Employees Local No. 19 v. NLRB*, 785 F.2d 796 (9th Cir. 1986) (App. B, B-1), and thereby creates an undesirable lack of uniformity in the administration of the NLRA. The continued existence of different rules with respect to the significant question of labor management relations here at issue—the test for establishing employer "taint" of a decertification petition—impedes the consistent application of national labor policy that the NLRA was designed to achieve.

The court below correctly noted that "not all violations of [the NLRA]," let alone all employer conduct, "necessarily taint decertification petitions to the extent that there can be no possibility of a good faith reliance on the petition evidencing a lack of majority union support." App. A, A-8. Notwithstanding the recognition of this principle, however, the standard applied by the Seventh Circuit for ascertaining which employer conduct constitutes a "sufficient taint" (App. A, A-10) is to simply determine whether the conduct "ha[s] the reasonable tendency to encourage the . . . decertification process." App. A, A-9. Virtually every employer comment negative to a union would meet this criterion. The decision below thus emasculates the heretofore settled axiom that, in order to create a "taint," there must be a demonstrable nexus between the employer's actions and employee disaffection for the union. As other Courts of Appeals have observed, where management comments, even if sufficient to support unfair labor practice liability, do not " '*significantly contribute* to [the] loss of majority or to the factors upon which a doubt of such majority is based,' " a refusal to bargain is not improper. *Hotel, Motel and Restaurant Employees Local No. 19*, App. B, B-9, quoting *NLRB v. Nu-Southern Dyeing & Finishing*, 444 F.2d 11, 16 (4th Cir. 1971) (emphasis added). "[T]he activity must be of such a character 'as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself.' " *Hotel, Motel and Restaurant Employees Local 19*, App. B, B-9, quoting *Guerdon Industries, Inc.*, 218 N.L.R.B. 658, 661 (1975).

The Ninth and Fourth Circuits' narrow "significant contribution" standard is substantiallly different from the broad "reasonable tendency to encourage" criterion ap-

plied by the Seventh Circuit. In the present case, for example, while Homan's statements may have met a "reasonable tendency" test, there is no basis for concluding that they "significantly contribute[d]" to employee disaffection for the Union. Such disaffection was already well established prior to Homan's comments. Her casual remarks to two employees—involving no threats, promises or pressure of any kind—did not cause or significantly contribute to the decertification effort. In this case, as in *Hotel, Motel, and Restaurant Employees Local 19,* there was "a brewing discontent with the Union which was neither connected with nor caused by the company's [actions]." App. B, B-10. Had the court below applied the standard of the Ninth and Fourth Circuits, it would necessarily have reached a different conclusion. Review by this Court is warranted therefore, to resolve an undesirable disharmony between the Circuits and provide guidance with respect to a recurrent question in an important area of federal labor law.

2. The Decision Below Is In Conflict With The Provisions Of Section 8(c) Of The NLRA And The First Amendment

Section 8(c) of the NLRA expressly permits employers to state their beliefs and opinions about unionization without incurring unfair labor practice liability. That Section " 'at an irreducible minimum protects the right of an employer to state its views, arguments, or opinion, and to make truthful statements of existing facts. The First Amendment would permit no less.' " *Roper Corp. v. NLRB,* 712 F.2d 306, 311 (7th Cir. 1983), quoting *Dow Chemical Co. v. NRLB,* 660 F.2d 637, 644 (5th Cir. 1981).

Moreover, "[a]n employer is not required to say something nice or say nothing at all about a union. [The employer's] expression of his own opinion concerning the union is also protected speech." *Roper Corp.*, 712 F.2d at 311. Only where an employer's statement is demonstrated to carry a threat or promise will the statement be subject to sanctions. *Id.*

In considering Hirsch's stated opinion at the employee meeting that there was no need for a "third party" as evidence of unlawful employer encouragement (App. A, A-9), the court below disregarded the requirements of Section 8(c) and the First Amendment. There was no dispute, as both the Court of Appeals and the Board found, that "Hirsch made no guarantees or promises." App. A, A-4. Likewise, neither the court nor the Board found any threat in Hirsch's statement of his belief that Weisser and its employees could work out any differences without a third party. There being no finding that Hirsch's expression of his own views contained any "threat of reprisal or force or promise of benefit," Section 8(c) mandates that Hirsch's statement "shall not constitute *or be evidence of* an unfair labor practice." 29 U.S.C. § 158(c) (emphasis added).

This mandate, as well as the employer's "First Amendment right to communicate his views to his employees" (*Roper Corp.*, 712 F.2d at 311 and cases cited therein), has been abrogated by the Court of Appeals' conclusion that Hirsch's statement "had the tendency to encourage the employees to sign the decertification petition." App. A, A-9. The court's reliance on Hirsch's statement, moreover, cannot be simply dismissed as the equivalent of

harmless error. Absent consideration of Hirsch's comment, the only employer misconduct alleged to have occurred during the applicable limitations period was Homan's isolated friendly remarks to two long-time co-workers. Those statements, standing alone, cannot create an impermissible taint. They did not significantly influence or assist the employees in the filing of the decertification petition. This Court should grant certiorari, accordingly, to correct the Seventh Circuit's mistaken view of Section 8(c) and the First Amendment which has occasioned, in this case, an erroneous interpretation of the NLRA.

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CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago, Illinois 60604

(Submitted March 12, 1986)*

March 25, 1986.

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

No. 85-1575, 85-1855

WEISSER OPTICAL COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Review of an Order of the
National Labor Relations Board and
Cross-Application to Enforce an Order of the
National Labor Relations Board

ORDER

The National Labor Relations Board ("Board") found that petitioner, Weisser Optical Company ("Weisser"), violated sections 8(a)(1) and 8(a)(5) of the Na-

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argu-

(Continued on following page)

tional Labor Relations Act ("Act"), 29 U.S.C. 158(a)(1), 158(a)(5),[1] by unlawfully encouraging its employees to file a decertification petition and then refusing to recognize or bargain with Local 853 of the United Optical Workers Union ("Union") based on the fact that a majority of the bargaining unit employees signed the petition. *Weisser Optical Co.*, 274 N.L.R.B. No. 143 (1985). Petitioner appeals and the Board seeks to enforce its order. We grant the Board's application for enforcement.

I

Weisser and the Union were parties to a collective bargaining agreement covering a unit composed of optical shop workers and stock department employees at three locations in Illinois. Seventeen of twenty-two bargaining unit employees were employed at the Peoria shop. Weisser is owned by Philip Hirsch. David Lloyd is the company's comptroller, and during most of the relevant time period, Sallie Homan was a supervisor at the Peoria shop. During February 1983, however, Homan was still a bargaining unit employee. The last contract with the Union expired on April 30, 1984 and it is undisputed that Weisser has refused to bargain with the Union since prior to that

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(Continued from previous page)

ment would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). Petitioner filed such a statement. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal has been submitted on the briefs and record.

1. Hereinafter we will simply cite to sections of the Act.

contract's expiration. Although eighteen of twenty-two employees signed a petition for a decertification election, no such election has yet been held.

In February 1983,[2] Hirsch called Ken Ratcliff, a bargaining unit employee, into his office. With Homan also present, Hirsch told Ratcliff that "we have to do something, the Union is killing me." He also told Ratcliff that he wanted to get rid of the Union and that he wanted Ratcliff to do something about it. Although he never used the word "decertification," Ratcliff clearly understood that Hirsch wanted him to push for a decertification election. That this was what Hirsch meant was made even more evident by the fact that Hirsch gave Ratcliff a pamphlet describing how to seek such an election. Ratcliff resisted the pressure placed on him and, after discussing it with coworkers, decided not to pursue decertification at that time.

The period in 1984 during which a decertification petition could be filed was February 1 to March 1. In February 1984, Homan told Ratcliff that Hirsch had called her to tell her "it was getting to be close to that time." Ratcliff understood that Hirsch was referring to the decertification petition. Later that month Homan asked Ratcliff to return the decertification pamphlet, if he still had it. Before bringing it to the shop he read it again. When he brought it to Homan, she said to deliver it to

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2. Although this is prior to the six-month statutory period covered by the complaint, see § 10(b) of the Act, the earlier events described are relevant to understanding the subsequent events that underly the complaint. *See Wanda Petroleum,* 217 N.L.R.B. 376 (1975).

Lloyd. Before delivering it to Lloyd, he detached the sample "showing of interest" form, and within a few days obtained a decertification form from the Board's Regional Office.

In both January and February 1984, Homan told James Menees, another bargaining unit employee, that Hirsch was "on her back" and "trying to get things started." Menees understood that she was referring to decertification proceedings. Although Menees' impression was that Homan did not desire that the union be decertified, he still understood, through Homan, that Hirsch desired that the union be decertified.

On February 24, 1984, a meeting of all the Peoria bargaining unit employees was held. Hirsch, Lloyd, and Homan were also present. Only one or two other such meetings, if any, were ever held by the company. Homan opened the meeting by saying she had received questions about what would happen, particularly regarding benefits, if there were no union. Hirsch then discussed the economic situation of the company and he and Lloyd also answered some questions. Hirsch made no guarantees or promises at the meeting, but he did say that he thought that those present were "mature enough" that they could "work out differences" with the company without a "third party," which the Board found to be a "clear reference" to the Union. Immediately after this meeting, Ratcliff began collecting signatures on the decertification petition.

At the hearing before the administrative law judge ("ALJ"), Ratcliff, Menees, another employee, the Union president, and Lloyd testified. The ALJ found that Weis-

ser violated sections 8(a)(1) and 8(a)(5) by unlawfully sponsoring and encouraging the decertification proceeding. He also found that the showing-of-interest petition was the product of flagrant and repeated interference with the employees' section 7 rights.[3] The Board affirmed the first finding, but reversed the second finding. Respondent does not contest the latter holding by the Board; we need only review petitioner's objections to the first holding.

II

Our review of the Board's decision is narrow.

> We must accept the Board's factual findings as conclusive, if they are supported by substantial evidence in the record as a whole. If an analysis of those facts implicates the agency's expertise, we 'recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life.' Finally, we must accord considerable deference to the Board's interpretation of the Act. If the Board's interpretation is reasonable, it will be accepted.

NLRB v. Manley Truck Line, Inc., 779 F.2d 1327, 1330 (7th Cir. 1985) (citations omitted). Neither party argues that the Board has misinterpreted the Act. While primarily arguing that the Board's findings are not supported by substantial evidence, petitioner also contends that the Board failed to properly follow standards set by past precedent and that a Board decision subsequent to the

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3. The facts underlying this finding are not fully described in this order because they are not relevant to our decision.

one under consideration changed Board policy in petitioner's favor. We consider these contentions below.

An employer has a duty to continue to bargain with an incumbent union, but the employer is not required to bargain with the union if it entertains a reasonably based, good faith doubt concerning the union's continued majority status. *Dresser Industries, Inc.*, 264 N.L.R.B. 1088, 1088 (1982); *Bellwood General Hospital, Inc. v. NLRB* 627 F.2d 98, 102 (7th Cir. 1980). A decertification petition signed by a majority of the bargaining unit employees can be the basis of such doubt, but if the petition was sufficiently tainted by unlawful employer action, there cannot be a good faith doubt based on the petition. *See Indiana Cabinet Co.*, 275 N.L.R.B. No. 169 at 5 (1985); *NLRB v. Maywood Plant of Grede Plastics*, 628 F.2d 1, 4-5 (D.C. Cir. 1980). It is a violation of section 8(a)(1) for the employer to instigate, sponsor, promote, or participate in the circulation of a decertification petition. *Texaco, Inc. v. NLRB*, 722 F.2d 1226, 1233 (5th Cir. 1984); *NLRB v. Allen's I.G.A. Foodliner*, 651 F.2d 438, 440 (6th Cir. 1981). Both parties apparently agree with the preceeding [sic] summary of the law, but they disagree as to whether Weisser improperly tainted the petition.

"In order to establish an 8(a)(1) violation, it need not be shown that an attempt at coercion succeeded; the test is whether the employer engaged in conduct which reasonably tended to interfere with, restrain, or coerce employees in the exercise of their section 7 rights." *NLRB v. Ajax Tool Works, Inc.*, 713 F.2d 1307, 1313 (7th Cir. 1983) (per curiam); *accord NLRB v. Great Western Coca-Cola Bottling Co.*, 740 F.2d 398, 404 (5th Cir. 1984); *see*

also BASF Wyandotte Corp., 276 N.L.R.B. No. 175 at 4 n.5 (1985). Although petitioner initially appeared to argue that an employer's unlawful *intentions* must be shown, in its reply brief it admitted that "reasonably tended" is the proper standard. Petitioner continues to argue, however, that it is necessary to show a causal nexus between the 8(a)(1) violation and the filing of the decertification petition; *i.e.*, that it must be shown that the employer's violation caused employees to initiate or circulate the petition. Petitioner relies primarily on *Douglas & Lamonson Co.*, 253 N.L.R.B. 277 (1980). But although that case indicates at one point that the General Counsel's prima facie case requires the showing of a "nexus" between the employer's actions and an employee's signing of the decertification petition, *id.* at 278, at another point it indicates that the "actual results" of the employer's actions are irrelevant, *id.* at 280. That case is therefore inconclusive. In another case cited by petitioner, petitioner appears to have erroneously cited a quotation from a party's brief, not an actual holding in the case.[4] *See Silver Spur Casino*, 270 N.L.R.B. 1067, 1071 (1984). Another case cited by petitioner indicates that the causal relation is to be considered but not in the same manner as petitioner proposes. That case states that there can be no violation if the decertification petition would have been filed even absent the employer's unlawful actions. *See Dayton Blueprint Co.*, 193 N.L.R.B. 1100, 1108 (1971). Such a position does not put the same burden of persuasion on the General Counsel that petitioner's position would. And

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4. Even if the quote is the Board's holding, the holding is the same as that in *Dayton Blueprint Co.* which is discussed below.

based on (a) Ratcliff's reliance on the decertification pamphlet; (b) the close time relation between Homan's request for the return of the pamphlet and Ratcliff contacting the Board; and (c) the close time relation between the February 24 meeting and the solicitation of signatures; if not other facts as well, we cannot find that the Board erred in not finding that there would still have been a decertification petition absent actions of Weisser. And, in any case, the weight of the case law is that no causal relation need be proven. *See, e.g., Ajax Tool Works,* 713 F.2d at 1313; *NLRB v. Berger Transfer & Storage Co.,* 678 F.2d 679, 689 (7th Cir. 1982); *C & W Super Markets, Inc. v. NLRB,* 581 F.2d 618, 623 n.5 (7th Cir. 1978); *Great Western Coca-Cola,* 740 F.2d at 404.

Petitioner is correct, however, in arguing[5] that not all violations of 8(a)(1) necessarily taint decertification petitions to the extent that there can be no possibility of a good faith reliance on the petition evidencing a lack of majority union support. *See BASF Wyandotte,* 276 N.L.R.B. No. 175 at 3-4; *Indiana Cabinet,* 275 N.L.R.B. No. 169 at 6. But it must be kept in mind that there are various stages of the decertification process: initiation of the petition; preparation, circulation, and execution of the petition; and the election campaign. The earlier the stage of the process, the less employer involvement is allowed and the more likely it is for employer involvement to taint the petition. *See generally,* Peirce, *Employer Participation in the Decertification Process: How Big a Help-*

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5. Although the briefs filed with the Board, which were not provided to us, would have made it more clear, we find that petitioner raised this issue in its exceptions and that it therefore did not waive this issue under section 10(b).

ing Hand?, 31 Buffalo L. Rev. 737 (1983). The employer is not permitted to initiate the decertification process either directly or by encouraging its employees to withdraw from the union, *see id.* at 743-48, and at the preparation and circulation stage it may not provide more than mere ministerial aid, *id.* at 748-57. Petitioner cites *Indiana Cabinet* as evidence of the Board's recent liberalization of the extent of permissible employer participation. But that case still adheres to the propositions that the employer (a) cannot request or encourage employees to start a decertification petition; (b) can only provide information concerning decertification if there is already an expression of employee dissatisfaction with the union; (c) cannot offer to assist in preparing and circulating the petition; and (d) cannot monitor whether a petition is started and who signs it. 275 N.L.R.B. No. 169 at 3-4.

In the case *sub judice*, there was substantial evidence to support the Board's finding that Homan's statements to Ratcliff were both unsolicited and, in light of the prior and more explicit request by Hirsch, had the reasonable tendency to encourage the initiation of the decertification process. There was also substantial evidence that unsolicited remarks were made by Homan which encouraged Menees to seek decertification. Additionally the statement to all the Peoria employees that there was no need for a "third party," meaning the union, had the tendency to encourage the employees to sign the decertification petition. We also note that even if Homan did not personally desire decertification, a largely irrelevant factor anyway, she made it clear to Ratcliff and Menees, who then spoke to other employees, that Hirsch, the owner of Weisser, was far from neutral on whether decertification

proceedings should be begun and instead was encouraging employees to seek decertification. *Cf. Texaco*, 722 F.2d at 1231-34. In sum, the Board acted well within its statutory limits in finding that Weisser violated 8(a)(1) by taking actions that reasonably tended to encourage decertification and that those findings were a sufficient taint on the decertification proceedings to preclude a finding that Weisser acted in good faith in refusing to bargain with the Union.

III

We find sufficient support in the record for the Board's findings that Weisser committed section 8(a) (1) and 8(a)(5) violations.

ENFORCEMENT of the Board's order is

GRANTED.

DHDe

274 NLRB No. 143

D-2396
Peoria, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 33—CA—6864
33—CA—6915
33—CA—6933

WEISSER OPTICAL COMPANY
and
LOCAL 853, UNITED OPTICAL WORKERS UNION

DECISION AND ORDER

On 6 September 1984 Administrative Law Judge Walter H. Maloney Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The Board has considered the record and the attached decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The Respondent and the Union were parties to a collective-bargaining agreement covering a unit of optical shop workers and stock department employees. Prior to the agreement's expiration on 30 April 1984, the Respondent refused to bargain with and withdrew recognition

from the Union based on a petition signed by 18 of 22 bargaining unit employees. While we disagree with the judge's finding as explained below that this showing-of-interest petition was the product of "flagrant and repeated" interference with employees' Section 7 rights, we agree that the Respondent unlawfully sponsored and encouraged the decertification effort and that its refusal to recognize and bargain with the Union and to provide the Union with necessary and relevant information violated Section 8(a)(5) and (1) of the Act.

The record reveals as background that, in early 1983, the Respondent's owner Philip Hirsch asked employee Ken Ratcliff to initiate a decertification effort, explaining that he wanted to rid the Respondent of the Union. Ratcliff reluctantly agreed and was provided a booklet explaining the Board's decertification process, which included sample language to be used in soliciting evidence of interest. Shortly thereafter, Ratcliff discussed the issue with other bargaining unit employees, and they decided not to pursue decertification.

In early February 1984, Ratcliff's immediate supervisor, Sallie Homan, told him she had received a telephone call from Hirsch who told her "it was getting close to this time," in reference to the Board's "open period" during which a decertification petition may be timely filed.[1] During a subsequent conversation in mid-February, Homan asked Ratcliff to return to the Respondent the pamphlet it had furnished him in 1983. Ratcliff shortly thereafter returned the pamphlet, but retained a photostatic

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[1] The "open period" for filing a decertification herein was 1 February to 1 March 1984.

copy of the sample evidence-of-interest language which he thereafter used in soliciting signatures on a petition. During this same period of time, Homan also told employee James Menees that Hirsch was "trying to get things started" and later told him that Hirsch had been "on her again about getting something started." On 24 February 1984 Hirsch conducted a meeting with all the Peoria employees[2] during which he told them he thought they were mature enough to work out any differences they had with the Respondent without a "third party," a clear reference to the Union. Immediately after the meeting, Ratcliff commenced soliciting signatures for the showing-of-interest petition at the Peoria facility which he used to support a decertification petition filed with the Board on 28 February.[3]

We agree with the judge that Homan's unsolicited remarks to Ratcliff were, in essence, a renewal of Hirsch's earlier expressed request that Ratcliff file a decertification petition and that her unsolicited comments to Menees[4] as

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2 The bargaining unit herein encompasses three different facilities located in Peoria, Moline, and Arlington Heights, Illinois. In early 1984, approximately 16 of the 22 bargaining unit employees were employed at the Respondent's Peoria lab.

3 In his decision the judge inadvertently misquoted the body of the employee petition, which states, in part, " . . . we believe a majority of employees in our unit *no longer* want to be represented by the above Union." (Emphasis added.)

4 In reaching this conclusion regarding Homan's conduct, we rely on the uncontradicted testimony of Ratcliff and Menees. We do not rely on fn. 7 of the judge's decision wherein he drew an adverse inference against the Respondent resulting from Homan's failure to testify. As Homan was pre-

(Continued on following page)

well as Hirsch's comment to the employees at the 24 February meeting constituted 8(a)(1) encouragement to employees to file a decertification petition.[5] Thus, the evidence establishes that the idea of decertification was implanted in the employees' minds by the Respondent. We find that, under the circumstances of this case, the Respondent's unsolicited involvement with the showing-of-interest petition constituted far more than mere ministerial aid and violated Section 8(a)(1).[6] *Silver Spur Casino*, 270 NLRB No. 155 (May 31, 1984). Accordingly, the Respondent could not rely on the tainted showing-of-interest petition in asserting a good-faith doubt concerning the Union's majority status, and its withdrawal of recognition from the Union and refusal to bargain and to provide the Union with necessary and relevant informa-

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(Continued from previous page)

sent at the hearing, it is clear that she was equally available to both sides and, therefore, no adverse inference can be drawn against either party for not calling her as a witness. *Plumbers Local 40 (Mechanical Contractors Assn.)*, 242 NLRB 1157, 1160 fn. 10 (1979). Nor do we find it necessary to rely on the judge's conclusion that the Respondent had placed Ratcliff in a position of apparent authority to solicit signatures.

[5] We find that Hirsch's statements at the meeting on 24 February violate Sec. 8(a)(1) as an aspect of the Respondent's unlawful sponsorship and encouragement of the decertification petition, relying particularly on the context in which such statements were made.

[6] Ratcliff's testimony regarding whether he would have filed the decertification petition in the absence of Homan's request was not clearly presented, and we do not rely on it to support our finding of unlawful sponsorship and encouragement.

tion violated Section 8(a)(5).[7] *Texas Electric Coop,* 197 NLRB 10 (1972); *Craftool Mfg. Co.,* 229 NLRB 634 (1977).

The judge's conclusion that the showing-of-interest petition was the product of flagrant and repeated interference with protected rights was apparently based on his additional findings that the Respondent independently violated the Act by promising benefits to employees if they should vote to decertify the Union, by soliciting employees to present grievances directly to the Respondent, and by engaging in individual bargaining with employees regarding the subject of employee health insurance. We find merit in the Respondent's exceptions to each of these findings.

The judge's findings in this regard are based on comments made by Homan and controller David Lloyd during the meeting with the Peoria lab employees on 24 February and also during a later conversation they had with employee Menees. During the meeting of 24 February Homan stated that she had been asked by some unspecified employees what pension and insurance benefits they would receive in the event of decertification.[8] In response to an inquiry made by an employee, Homan explained her own pension benefits without specifying dollar amounts. Lloyd explained to the employees that there were several dif-

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[7] The Respondent concedes that there are no facts in dispute regarding its refusal to bargain with the Union or its refusal to provide the Union with necessary and relevant information. We do not adopt the judge's comments in fn. 8 of his decision regarding the Respondent's involvement of the Union in its decision to grant employees a pay increase.

[8] The parties' collective-bargaining agreement provided for the Respondent to pay into union-administered health insurance and pension trust funds on behalf of its employees.

ferent pension plans that "could be looked into" in the event of decertification, and he mentioned a K-401 plan and IRAs. The value of such benefits was not discussed. In early March, Lloyd asked Menees what the "biggest hang up" was in connection with the decertification.[9] Menees responded that the employees did not trust Hirsch and that the union-administered health plan required the employees to pay $750 deductible whereas the Respondent's health plan required a $1250 deductible. Lloyd told Menees that there was a "possibility" the Respondent could "look into" self-insuring the difference in the two deductibles.

The judge found that by these statements the Respondent violated Section 8(a)(1) by promising benefits to employees if they should vote to decertify the Union. He also found that the Respondent violated Section 8(a)(5) and (1) by soliciting employees to bypass the Union and present grievances directly to the Respondent and that it bypassed the Union and bargained directly individual employees.

Contrary to the judge, we find neither the statements made by Lloyd and Homan during the 24 February meeting nor Lloyd's statement to Menees to be violative. It is clear from the record that employees were never promised increased benefits if they decertified the Union. Indeed, the employees were told by Hirsch during the 24 February meeting that there are "no guarantees in life" in response to an inquiry whether the Respondent could

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[9] At the time of their conversation the decertification petition had already been filed by employee Ratcliff. Menees testified he understood Lloyd's comment as referring to an anticipated election.

guarantee the employees a 40-hour per week work schedule in the absence of union representation. The statements expressed by Lloyd during the 24 February meeting merely informed employees that there are alternative pension plans to the one administered by the Union, without making any reference to the level of benefits under such alternate plans. Similarly, Lloyd's comment to Menees in early March constitutes, at most, a lawful promise to maintain the status quo. *El Cid, Inc.*, 222 NLRB 1315 (1976). Nor do we find the pension plan statements to be an 8(a)(5) solicitation to employees to bypass the Union and present grievances directly to the Respondent. The fact that these statements were made at times when the employees were represented by the Union is of no legal significance since the statements were all in reference to what may occur subsequently in the absence of union representation. Further, the Respondent never solicited grievances during the meeting regarding existing benefits or employment conditions. Similarly, Lloyd's statement to Menees that the Respondent could "look into" the possibility of providing the employees with comparable health insurance coverage in the event of decertification cannot be considered individual bargaining as it, too, was predicated on the absence of union representation. Accordingly, we reverse the judge's findings that the Respondent promised additional benefits to employees, engaged in the solicitation of grievances in an effort to bypass the Union, or individually bargained with its em-

ployees.[10] We dismiss those portions of the consolidated complaint.[11]

ORDER

The National Labor Relations Board orders that the Respondent, Weisser Optical Company, Peoria, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from and refusing to bargain collectively in good faith with Local 853, United Optical Workers Union, as the exclusive collective-bargaining representative of its optical laboratory employees.

(b) Refusing, on request, to furnish the Union the wage rates of unit employees or any other information which is relevant to the Union's responsibility as bargaining representative.

(c) Sponsoring the filing of a decertification petition or unlawfully urging employees to support the decertification of the Union as their bargaining agent.

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[10] Member Dennis would find that the Respondent unlawfully solicited grievances when Controller Lloyd asked employee Menees what the "biggest hang up" was in connection with the decertification.

[11] In his recommended Order, the judge provided that the Respondent shall cease and desist "by any other means or in any other manner" from infringing on employee rights guaranteed in Sec. 7 of the Act. However, we have considered this case in light of the standards set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), and have concluded that a broad remedial order is inappropriate inasmuch as the Respondent has not been shown to have engaged in egregious misconduct demonstrating a general disregard for employees' fundamental statutory rights. Nor has there been any showing that the Respondent has a proclivity to violate the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions which are designed to effectuate the purposes and policies of the Act.

(a) Recognize and bargain collectively in good faith with respect to wages, hours, and terms and conditions of employment with Local 853, United Optical Workers Union, as the exclusive collective-bargaining representative of all of the Respondent's optical laboratory employees, exclusive of superintendents, managers, and other supervisors as defined in the Act, and, if agreement is reached, embody the same in a written, signed document.

(b) Furnish the Union with a complete and current list of all bargaining unit employees, together with their individual rates of pay before and after 30 April 1984.

(c) Post at its Peoria, Arlington Heights, and Moline, Illinois laboratories copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to em-

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[12] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

ployees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. 14 March 1985

Donald I. Dotson, Chairman

Robert P. Hunter, Member

Patricia Diaz Dennis, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX

Form NLRB-4727 (9-69) JD—352—84

(SEAL) (SEAL)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WEISSER OPTICAL COMPANY IS POSTING THIS NOTICE TO COMPLY WITH AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, WHICH WAS ISSUED AFTER A HEARING BEFORE AN ADMINISTRATIVE LAW JUDGE, IN A CASE IN WHICH WE WERE FOUND TO HAVE VIOLATED CERTAIN PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT.

WE WILL NOT withdraw recognition from LOCAL 853, UNITED OPTICAL WORKERS UNION, as the exclusive collective bargaining representative of our laboratory employees at our Peoria, Moline, and Arlington Heights laboratories. WE WILL bargain collectively in good faith with that Union as the exclusive collective bargaining representative of those employees and, if an agreement is reached, we will embody that agreement in a written, signed document.

WE WILL furnish the Union with data pertaining to the wage rates of bargaining unit employees both before and after April 30, 1984, and WE WILL NOT refuse to furnish the Union with any requested data which is relevant to its responsibility as bargaining agent for our employees.

WE WILL NOT bypass that Union by soliciting grievances directly from bargaining unit employees or by bargaining directly with employees over the amount of deductible coverage by health insurance policies or any other matter respecting wages, hours, or terms and conditions of employment.

WE WILL NOT sponsor the filing of a decertification petition. WE WILL NOT urge bargaining unit employees to support the decertification of the Union as their bargaining agent. WE WILL NOT promise benefits to employees if they vote to decertify the Union.

WE WILL NOT by any other means or in any manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the Act. These rights include the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for their mutual aid and protection.

WEISSER OPTICAL COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions

concerning this notice or compliance with its provisions may be directed to the Board's Office, Savings Center Tower—16th Floor, 411 Hamilton Boulevard, Peoria, Illinois 61602, Telephone (309) 671-7068.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES

Cases Nos. 33—CA—6864
33—CA—6915
33—CA—6933

WEISSER OPTICAL COMPANY
and
LOCAL 853, UNITED OPTICAL
WORKERS UNION

John C. Gwynn, Esq., of Peoria, Illinois,
for the General Counsel.

John R. Diesselhorst, of Chicago, Illinois,
for the Charging Party.

Lawrence M. Cohen, Esq., of Chicago, Illinois,
for the Respondent.

DECISION

I. Findings of Fact

A. *Statement of the Case*

WALTER H. MALONEY, JR., Administrative Law Judge: This case came on for hearing before the undersigned at Peoria, Illinois, upon a series of unfair labor practice complaints,[1] issued by the Director and the Act-

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[1] The principal docket entries in these cases are as follows:

Charge filed herein by Local 853, United Optical Workers Union (herein called Union) against the Respondent in Case No. 33—CA—6864, on February 29, 1984; Complaint

(Continued on following page)

ing Director of the Board's Thirty-Third Region and consolidated for hearing, which allege that the Respondent Weisser Optical Company[2] violated Sections 8(a)(1) and (5) of the Act. More particularly, the consolidated complaints allege that the Respondent solicited employees to file a decertification petition and did so by promising to continue benefits and job security, solicited grievances directly from employees, and by-passed the Union by offering to arrange for coverage of the deductible portion of the Company's hospitalization insurance, refused to

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issued by Director, Region 33, against Respondent in Case No. 33—CA—6864, on April 10, 1984; Respondent's Answer in Case No. 33—CA—6864 filed on April 20, 1984; Charge filed by Union against Respondent in Case No. 33—CA—6915, on April 30, 1984; Complaint issued by Acting Director, Region 33, against Respondent in Case No. 33—CA—6915, on May 23, 1984; Respondent's Answer filed in Case No. 33—CA—6915 on June 4, 1984; Charge filed by Union against Respondent in Case No. 33—CA—6933 on May 24, 1984; Complaint issued by Director, Region 33, against Respondent on June 8, 1984, along with an order consolidating for trial all outstanding complaints against the Respondent; Respondent's Answer filed June 12, 1984; Hearing held in Peoria, Illinois, on June 13, 1984; Briefs filed with the undersigned by the General Counsel and the Respondent on or before August 6, 1984.

[2] Respondent admits, and I find, that it is an Illinois corporation with offices and places of business located *inter alia* at Peoria, Moline, and Arlington Heights, Illinois, where it is engaged in the manufacture and retail sale of eye glasses. During the preceding twelve months, in the course and conduct of its business operations, the Respondent derived gross revenues in excess of $500,000 and purchased directly from points and places located outside the State of Illinois goods and materials valued in excess of $50,000. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sections 2(2), 2(6), and 2(7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

meet with the Union for the purpose of negotiating a new contract, withdrew recognition from the incumbent collective bargaining representative, and refused to furnish the Union with information requested for the purpose of collective bargaining. The Respondent denies that it solicited employees to file a decertification petition, that it made any promises of benefit respecting its conduct in the event that employees should decertify the incumbent union, or that it improperly refused to bargain with the Union. Respondent maintains that it withdrew recognition because it had objective evidence that the Union had lost its majority status. Upon these contentions, the issues herein were joined.[3]

B. *The Unfair Labor Practices Alleged*

Respondent both manufactures and sells at retail eye glasses and related products. It operates three laboratory facilities located at Peoria, Moline, and Arlington Heights, Illinois, as well as 57 retail stores located in various cities in Illinois. It has, from time to time, opened temporary satellite manufacturing facilities during the summer to meet short-term seasonal demands. The unfair labor practices at issue in this case pertain only to Respondent's production facilities, where, during the spring of 1984, it employed about 22 people. The principal facility is at Peoria.

Since 1970, the Union has represented and bargained for all of the Respondent's optical shop workers and stock department employees. Its most recent contract with the

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[3] The transcript herein is hereby corrected as follows:

1. On page 11, line 20, change "recognizes" to "represents"

Respondent was a one-year agreement, concluded in the spring of 1983, which expired on April 30, 1984.

Before the execution of this agreement, Respondent's owner, Philip Hirsch, called employee Ken Ratcliff into the office of Laboratory Director Sallie Homan for a talk. Ratcliff, a former plant superintendent, was then and is now employed as foreman of the Finish Room, a position which all parties agree is non-supervisory despite its title. Hirsch told Ratcliff that "we have to do something. The Union is killing me. I can't compete." Hirsch then asked Ratcliff to circulate a decertification petition among the employees. Ratcliff demurred, asking Hirsch in effect why Hirsch was picking on him. Hirsch replied that he was seeking Ratcliff's assistance because he felt that Ratcliff had better rapport with the employees. He gave Ratcliff a booklet to assist in the decertification effort. The booklet was later identified as a portion of a tract or treatise called "Union Decertifications" written by Washington, D. C., attorney Francis T. Coleman of the firm of Venable, Baetjer, Howard, and Civiletti. The excerpt in question included a form which could be used as the pattern for a showing-of-interest petition to accompany the filing of a decertification petition. Ratcliff took the booklet home with him. Shortly thereafter, he attended an informal meeting of Respondent's laboratory employees held at the home of employee Frank Lewis. During this meeting, the group reached a concensus [sic] that they would not support decertification at that time.

The insulated period for the filing of representation petitions prior to the expiration of a contract expired in this case on February 29, 1984. Sometime in January, 1984, during an informal conversation in Sallie Homan's

office, Mrs. Homan told Ratcliff that she had talked with Phil Hirsch and told Ratcliff that "it was getting to be close to that time." Both of them understood her reference to be to the period in which a representation petition could be filed prior to the expiration of a contract. In mid-February, they spoke again about decertification during another informal conversation in Mrs. Homan's office. On this occasion, Mrs. Homan asked Ratcliff if he still had the decertification booklet he had been given the previous year. Ratcliff said he thought he did. She asked him to bring it to the plant and give it to her. Ratcliff was able to locate it at his home and, a few days later, brought it in. Mrs. Homan directed him to give it to the Comptroller, David Lloyd, and Ratcliff complied with the request, detaching from the booklet the showing-of-interest pattern form which he then filled out and circulated. Ratcliff also contacted the NLRB Regional Office in Peoria. Ultimately he went to the Board office and obtained some representation petition forms. When at the Board office, he was assisted by the information officer in filling out the form.

During this same period of time, Mrs. Homan had a conversation in her office with employee James Menees concerning decertification. She told Menees that Hirsch had been on her back to get a decertification petition started. On a later occasion, she again spoke with Menees in her office. The latter asked her why she was so "down in the dumps" and she replied that Hirsch was on her back to get something started leading to decertification of the Union. She said that there was not much time left and that, if she could hold off a little longer, it would be too late to file.

In the afternoon of February 24, 1984, a meeting of all of the Peoria lab employees was held in the lab. Hirsch, Homan, and Lloyd were present. On the morning before this meeting, Hirsch had contacted his attorney in Chicago to seek advice as to what he was legally authorized to say at such a meeting and what he might be forbidden to say. Among the things he was told by his attorney was that he could not tell employees to go to the NLRB because that was their decision. He was also advised that he could not tell employees what they would get if the Union were to be voted out, but he could inform them as to what non-union members were receiving in wages and benefits.

Hirsch opened the meeting by thanking employees for their past efforts. He also stated that, while he could not make any guarantees, he hoped there would always be a lab in Peoria. He told them that what happened in the future depended on the growth of the Company. Mrs. Homan told employees that she had received some questions as to what would happen to pension and insurance benefits if the Union was voted out. She said that Hirsch and Lloyd were the people who could answer those questions. Lloyd informed the gathering that there were several different plans which the Respondent could look into, including an R-401 plan and IRA's as well as a number of others. He stated that employees could qualify for a "401" pension plan if they got out of the Union and other management spokesmen said that the Respondent could provide them with insurance directly if they elected to leave the Union.

One employee asked Hirsch if he could guarantee them a forty-hour week if they voted the Union out. Hirsch said that there were no guarantees in life but reminded

employees that there were in existence various laws which prevented arbitrary firings. He ended the meeting by telling employees that he felt that they were mature enough to work out any differences with him without the intervention of a third party. In the assessment of Ratcliff, Hirsch either stated or inferred that he wanted employees to sign a decertification petition.

Shortly thereafter, Ratcliff began to circulate a showing-of-interest form in support of a decertification petition. During the afternoon of February 24 and again the following week, he approached Peoria employees at their work stations or maintained the form at his desk for this purpose. He phoned employees at the Arlington Heights and Moline plants from Mrs. Homan's office, indicated what he was doing, and told them that he was sending over showing-of-interest forms for their signatures. He urged them to return the forms promptly because the filing deadline was drawing near. He then forwarded the forms to the other labs through the Company's inter-office delivery system and received them back in the same manner. On February 28, Ratcliff went to the Board office and filed a decertification petition along with signed showing-of-interest forms (Case No. 33—RD—394). On the following day, the Union filed the first of three charges in this case.

While these activities were in progress, the Union was making an effort to begin negotiations for a new contract. On February 17, Union President and Business Agent John R. Disselhorst wrote the Respondent a so-called 60-day letter in which he asked to begin collective bargaining for a new agreement and requested the Re-

spondent to schedule a meeting for negotiations. On February 24, the same day that Hirsch was meeting with lab employees, Company attorney Lawrence M. Cohen sent Disselhorst a reply asking him to contact Cohen to arrange the time and place for a bargaining session.

On March 2, the Respondent mailed a letter to all of its lab employees which was signed by Hirsch, Lloyd, and Mrs. Homan. The letter read:

> On Thursday, March 1, 1984, we received a petition from the National Labor Relations Board. This petition was filed by employees who wish to decertify the Optical Workers Union as their representative. The National Labor Relations Board will now schedule a secret ballot election to give you a chance to vote. In the election, you will have the right to vote for or against the Optical Workers.
>
> It has always been our opinion that you do not need a union—period. The union will tell you that you will lose everything that you now have if you vote the union out. *THAT'S NOT TRUE,* we have no intention of cutting your pay or taking away any of your benefits. Many of our non-union employees, such as Sallie, have as good, if not a better, package of pay, benefits and security protection as you have. The real questions you must now decide are: Has the union done enough for me to be worth the big dues I must pay them? Can I trust John Disselhorst and the union to represent me fairly and deal with me honestly?
>
> Between now and the secret ballot election there will be much for you to consider and discuss. We will provide you with all the facts. You can then decide for yourself if the Optical Workers deserve your support. (emphasis in the original)

On March 13, the Respondent sent a second letter to its labor employees over Hirsch's signature. This letter read:

Several employees have expressed their concern as to what I will do if the Union is voted out. I have absolutely no intention of changing your wages, hours, or working conditions.

I PROMISE YOU that if the Union is voted out:

1. Weisser will maintain your current hours;

2. Weisser will maintain comparable insurance and retirement benefits; and

3. Weisser will maintain our policy that no one will be discharged without just cause.

My lawyer has told me that employer policy statements may be enforced as contracts. I have signed the bottom of this letter as I have signed the bottom of union contracts.

I believe that the Weisser Lab deserves a chance to work with you without the Optical Workers Union.

Early in March, Menees happened to have a conversation in the plastic surface room with Lloyd in the presence of Mrs. Homan and one other person. Lloyd asked Menees if he had received a recent letter from the Company. When Menees replied that he had, Lloyd asked him if he had any questions concerning its contents. Menees said he had none. Lloyd then asked Menees what was the biggest hang up concerning the decertification effort. Menees replied that a lot of employees did not trust Hirsch and did not believe they could work for him without a union. They went on to discuss insurance. It came out that the Union health insurance plan which then covered employees had a $750 deductible while the Company plan which was in effect for supervisors had a $1,250 deductible. When this disparity was brought to Lloyd's attention, he told Menees that possibly the Company could provide self-insurance to cover the difference.

Without objection there was received into evidence a six-page document identified by Lloyd as a document which he received from Mrs. Homan before April 4, 1984. There is no other explanation as to how it came into his possession.[4] The first page consists of an unsigned, undated paper, presumably from the Regional Office but bearing no Board stamp, letterhead, or other identifying mark. It states that it is a receipt for a showing of interest in support of a decertification petition in Case No. 33—RD—394 reflecting that 18 employees in the unit support the petition. Following that page are five additional pages, each of which bears the same legend at the top which was apparently copied from the booklet given by Hirsch to Ratcliff. The legend reads:

> The undersigned employees of the (name of company) presently represented by (name the union and the identification of the local that now represents you) wish to have the National Labor Relations Board conduct an election, since we believe a majority of employees in our unit want to be represented by the above union.

On two of the pages. the format varies slightly since the name "Weisser Optical" and "United Optical Workers Union, Local #883" were filled in in place of the parentheses which appear above. Three of the papers have the words "Peoria Lab" written by hand at the top. The other two have "Moline Lab" and "Arlington Lab." Lloyd testified that the names appearing on the pages were the names of employees in the Respondent's labs. None of the signa-

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[4] Ratcliff testified that, at some point in time, he told Mrs. Homan that 18 employees had signed the decertification petition showing-of-interest form but he did not tell her who had signed the form.

tures appearing on any of the documents were authenticated. One of the pages, bearing the date 2/27/84, contains a list of signatures, occupations, and hand written entries showing the date of 2/29/84, the day after the RD petition was filed. Some of the other papers are dated and some are undated. Some of the papers bear signatures which were apparently duplicated on other papers. The reason for this duplication was not explained on the record.

On April 4, Disselhorst forwarded to Cohen an initial list of Union bargaining demands, including a wage increase, additional sick days, more holidays, and increases in insurance and pension trust contributions. On April 5, Mrs. Homan sent a letter to employees which read as follows:

> As you know, the Union filed a charge with the Labor Board claiming the decertification petition was not properly filed. The Labor Board has now decided to hold a hearing. The hearing will not be held for a long time. Then it will be many more months, or even years, until the Labor Board issues a decision. Until the hearing is held and a decision is issued, the decertification election cannot be held.
>
> We are confident that the Labor Board will decide that there should be an election. We want you to have a choice. Unfortunately, there is nothing we can do to make an election take place. Unless the union withdraws the charge, it will be a long time until this matter is resolved.
>
> We will keep you informed as we learn more.

On April 10, the Board notified Ratcliff that it was issuing a complaint against the Respondent because of misconduct associated with the filing of the decertification petition and that it was dismissing the petition. Ratcliff did not

appeal the dismissal in the time allowed by the Board's Rules and Regulations. On the same day, Cohen wrote Disselhorst a letter refusing to bargain with the Union because the Respondent had received a valid decertification petition supported by a majority of the bargaining unit and, on the basis of this evidence, asserted a good faith doubt as to the Union's continued majority status. The Union's response to Cohen's letter was a renewed demand for bargaining, issued this time by the Union's attorney William F. Lennon. Lennon also asked that Disselhorst be allowed to continue to come onto Company property for the purpose of meeting with employees and servicing the contract.

On April 27, Cohen sent another letter to Disselhorst in which he reiterated the Company's belief that the Union had lost its majority status. He also contended that the charge filed by the Union was blocking a representation election and that, as a result, all wages and working conditions had to be frozen.[5] Cohen went on to state that a wage freeze would work a substantial hardship on lab employees and proposed that, as of April 30, they be given an across-the-board increase of 5%. He said that, by making this proposal to the Union, the Respondent was not thereby recognizing the Union as the bargaining representative of its lab employees but indicated that the Respondent would not make the increase without the Union's consent because it did not want to render itself liable for an additional un-

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[5] While the pendency of an 8(a)(5) charge or complaint blocks the conduct of an election and such blockage cannot be removed even by a union request to proceed with the election, as of this point in time the election petition had been dismissed and the time for appealing that dismissal had expired.

fair labor practice charge should its doubt of the Union's majority status ultimately be determined to be unfounded. Cohen also wrote to the Union attorney, stating that Disselhorst would be permitted to visit the plant to speak with employees during non-working hours but would have to report to the office first before making any visits.

On May 1, Disselhorst wrote to Cohen, agreeing to an immediate across-the-board wage increase of 5%. He also took the occasion to request from the Respondent a list of the names of all bargaining unit employees, together with their present wage rates and the new rates following the wage increase. By letter, dated May 18, Cohen denied Disselhorst's request for information, again reiterating the Respondent's doubt of the Union's majority status.

C. Analysis and Conclusions

Since its decision in *Celanese Corporation of America,* 95 NLRB 644, the Board has held in a consistent line of cases that a long-standing contractual relationship between an employer and a collective-bargaining agent gives rise to a presumption of continued majority status on the part of the Union, even after the end of the certification year or the expiration of the term of a collective-bargaining agreement. *Laystrom Manufacturing Co.,* 151 NLRB 1482; *Terrell Machine Company,* 173 NLRB 1480, enf. 427 F.2d 1088 (C.A. 4, 1970), cert. denied 398 U.S. 929; *Davis & Hemphill, Inc.,* 177 NLRB 282; *Barrington Plaza and Tragniew,* 185 NLRB 962; *Emerson Manufacturing Company, Inc.,* 200 NLRB 148. To avoid an obligation to bargain in such a circumstance, an employer must be able to establish that he had a good-faith doubt of the Union's con-

tinued majority representative status.[6] This doubt must be reasonably based and factually supported, and may not be asserted in the context of employer unfair labor practices aimed at causing employee disaffection from the Union. *King Radio Corporation*, 208 NLRB 578; *Harpeth Steel, Inc.*, 208 NLRB 545. The filing by employees of a decertification petition does not, in and of itself, provide an employer with a sufficient factual basis for avoiding a bargaining obligation based upon the assertion of a good-faith doubt. *Southwest Chevrolet Corp.*, 194 NLRB 975; *Dayton Town and Country Furniture Shop, Inc.*, 172 NLRB 955; *Universal Gear Service Corporation*, 157 NLRB 1169, enfd. 394 F.2d 396 (C.A. 6, 1968); *Allied Industrial Workers, Local 289 v. NLRB*, 476 F.2d 868 (C.A. D.C., 1973). In some circumstances, the filing of a decertification petition, coupled with evidence that the petition is supported by over 50 percent of the employees in the bargaining unit, has been held to provide an employer with a reasonable basis upon which to predicate a good-faith doubt of an incumbent union's continued majority status. *GAF Corporation*, 195 NLRB 169; *Newhouse Boardcasting Corporation, d/b/a WAPI-TV*, 197 NLRB 885. However, as with any other factual circumstance, such a contention will not be honored, even in the face of a decertification petition supported by a majority of employees in the bargaining unit, if at the same time the employer is attempting unlawfully to use its influence to cause employees to repudiate the union. *Boren Clay Products Company*, 174 NLRB 895, enfd. 419 F.2d

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[6] As the Board pointed out in *Terrell Machine Co., supra*, fn. 3, majority representative status means that a majority of employees in the unit wish to have the union as their representative for collective bargaining purposes.

387 (C.A. 4, 1970); *Fremont Newspapers, Inc.*, 179 NLRB 390; *Firestone Synthetic Rubber and Latex Company*, 173 NLRB 1179; *Texas Electric Coop., Inc.*, 197 NLRB 10; *The Rogers Manufacturing Company*, 197 NLRB 1264.

Of critical importance in the resolution of this case is the status of Ken Ratcliff. At one time he was a superintendent of the plant. At the time of the events here in question, he was a non-supervisory foreman. The term commonly used to describe such positions is leadman. The question at issue is whether he was a non-supervisory agent, for whose actions the Respondent was vicariously responsible, when he circulated a showing-of-interest petition and filed a decertification petition.

The Supreme Court said long ago in an analogous situation that:

> The employer . . . may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of *respondeat superior*. We are dealing here not with private rights nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence. The existence of that interference must be determined by a careful scrutiny of all the factors, often subtle, which restrain the employees' choice and for which the employer may be fairly said to be responsible. Thus, where the employees would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contem-

> plates. *Local 35, International Association of Machinists v. NLRB (Serrick Corporation)*, 311 U.S. 72, at 699, 700 (1940) (citations omitted).

What has been said with respect to employer responsibility for interference in support of a union's effort to achieve recognition is equally applicable to employer responsibility for interference aimed at thwarting or depriving a labor organization of the status of bargaining representative. See *Broyhill Company*, 210 NLRB 288; *Helena Laboratories Corporation*, 225 NLRB 257, enf. 557 F.2d 1182 (5th Cir. 1977).

In this case, the Respondent's President asked Ratcliff to circulate a decertification petition and gave him a booklet containing instructions and a form to assist in this effort. Ratcliff initially declined the request. Later, Hirsch, acting through Supervisor Homan, in effect renewed his original request. At the time of the second request, Ratcliff was more accommodating. Ratcliff testified that he would not have gone to the Board and filed the petition but for the request made to him by Homan.

Ratcliff prepared and circulated the showing-of-interest petition on Company time and with the assistance of Company facilities, including its telephone and its interplant communications system. At the same period of time Ratcliff was performing this chore, the Respondent held an employee meeting at a critical point in time, which could have no other meaning or purpose than to urge employees to support the decertification effort. Not only was Ratcliff placed in a position where employees could reasonably believe that he was acting to carry out a management effort, he was actually requested to do what he did in filing the petition in Case No. 33—RD—394. Accordingly, I conclude

that, in performing these acts, Ratcliff was a non-supervisory agent of the Respondent, so the latter was as responsible for what Ratcliff said and did in this regard as much as if Hirsch had circulated the showing-of-interest form personally.

It is axiomatic that an employer may not sponsor the decertification of a labor organization. As Ratcliff's entire course of conduct constituted a decertification effort for which the Respondent was vicariously responsible, it follows that such conduct constituted a violation of Section 8 (a) (1) of the Act. *NLRB v. Brown Speciality Company*, 436 F.2d 372 (7th Cir. 1971). Since the circulation of the showing-of-interest form and the filing of the petition brought about a situation which the Respondent itself created. the Respondent cannot rely upon either of these elements in claiming that its doubt of the Union's majority status was asserted in good faith. Indeed, its professed doubt was nothing more than an expression of bad faith which characterized its activities and permeated its relationship with the Union throughout this entire period of time, during which the Respondent was professing to bargain with the Union for a new contract at the same time it was actively seeking to undermine the Union's status as bargaining agent. Such action in and of itself is a violation of Section 8(a) (5) of the Act.

The evidence is uncontradicted[7] that, on two occasions, both within the period of limitations, Mrs. Homan had occa-

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[7] Mrs. Homan was present at the hearing but was not summoned to testify. Under well established rules of evidence, I conclude that, had she testified, her testimony would have corroborated the General Counsel's witnesses.

sion to speak with Ratcliff on the subject of the decertification petition. On the second such occasion, she asked him if he still had the excerpt from the how-to-do-it manual on decertification which Hirsch had given him the previous year. When he said he thought he did, she asked him to bring it. On both occasions, which took place within an eight-week period before the petition was actually filed, she reluctantly but effectively urged him to start circulating a showing-of-interest petition and to file a decertification petition. By engaging in such conduct, the Respondent violated Section 8(a) (1) of the Act. During the same period of time, Mrs. Homan conducted similar conversations with Menees and for the same purpose. Those conversations also violated Section 8(a) (1) of the Act.

On February 24, the same day that Ratcliff began the circulation of a decertification showing-of-interest petition, Hirsch held a meeting of employees. The timing of the meeting to coincide with the circulation of the petition can hardly be said to be coincidental, especially in light of previous direct requests made by Mrs. Homan to two employees to undertake this effort before the February 29 deadline. Among the things Hirsch told employees was that he felt that they were mature enough to work out any differences they might have without the intervention of a union. This combination of circumstances makes it clear that Ratcliff's assessment of the meeting was not merely a subjective opinion but that Hirsch solicited and encouraged employees to support the decertification effort. By Hirsch's action the Respondent violated Section 8(a) (1) of the Act.

The statements of Mrs. Homan and Lloyd at this meeting in outlining what pension plans might be available to

employees in the event they abandoned union representation went far beyond a promise to continue existing benefits in the event of de-unionization. They constitute a discussion of new or different benefits, undertaken directly with employees at the time the employees were represented by a recognized bargaining agent. Lloyd engaged in the same type of conduct a few days later in a discussion he initiated with Menees. After interrogating Menees as to the latter's lack of enthusiasm for the decertification effort, Lloyd learned of Menees' concern about the wide disparity between the deductible portion of the health insurance policy which covered supervisory employees and the policy which then covered bargaining unit employees. Lloyd told Menees that possibly the Company could provide from its own resources a sum of money which would make up the difference in deductibles. This discussion also constituted direct bargaining with an employee over terms and conditions of employment at a time when the employee was represented by a recognized bargaining agent. This effort at undermining the bargaining agent was consistent with and fitted well into the decertification effort for which the Respondent was also responsible for undertaking. Both of the above-recited actions on the part of Respondent's agents constituted violations of Section 8(a) (5) of the Act.

On April 10, the same day that the Regional Office dismissed Ratcliff's decertification petition, Respondent's counsel wrote the Union a letter in which he flatly refused to bargain with the Union. This letter was followed by another one, dated April 27, in which he withdrew recognition from the Union. The basis for both of these actions was the Respondent's doubt of the Union's continued majority status as evidenced by the filing of a decertification

petition and a showing-of-interest petition signed by a majority of unit employees. As of the date of the initial letter, the decertification petition was in the process of being dismissed. As of the date of the second letter, the dismissal was final as no timely appeal from the Regional Director's action had been taken by the petitioner. With respect to the showing-of-interest petition, it was, as discussed fully above, the product of flagrant and repeated employer interference with protected rights. Accordingly, the Respondent had no warrant in relying upon it. Thus, by refusing to bargain with the Union and by withdrawing recognition from it,[8] the Respondent herein violated Section 8(a) (1) and (5) of the Act.

Having been treated as a *de facto* bargaining agent by the Respondent over the question of an across-the-board pay increase, the Union seized upon this opening by agreeing to the increase and, at the same time, requesting information from the Respondent concerning the wage rates of unit employees. Such information is plainly relevant to a union's responsibilities as bargaining agent.[9] On or about May 17, the Respondent declined this request, again on the basis that it doubted that the Union was still the bar-

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[8] In withdrawing recognition, the Respondent was plainly walking on its tip toes. Late in April, the Respondent in effect bargained with the Union over a 5% across-the-board pay increase for unit employees at the same time it was asserting that it had no obligation to bargain and was not even recognizing the Union as a bargaining agent. One thing the Act clearly frowns upon is this kind of carrying water on both shoulders.

[9] See *Brooklyn Union Gas Company*, 220 NLRB 189, and cases cited therein at pages 191, 192.

gaining agent of its employees. As the major premise of the Respondent's position was invalid, its action was a further violation of Section 8(a) (5) of the Act. I find and conclude.

Upon the foregoing findings of fact and upon the entire record herein considered as a whole, and pursuant to Section 10(c) of the Act, I make the following:

II. Conclusions of Law

1. Weisser Optical Company is now and at all times material herein has been an employer engaged in commerce within the meaning of Sections 2(2), 2(6), and 2(7) of the Act.

2. Local 853, United Optical Workers Union, is a labor organization within the meaning of the Act.

3. All optical shop workers and stock department employees employed by the Employer at its facilities in Peoria, Moline, and Arlington Heights, Illinois, excluding managers, superintendents, and all other supervisors within the meaning of the Act constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union has been the exclusive bargaining representative of all of the employees in the unit found appropriate in Conclusion of Law Number 3 for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By purporting to bargain collectively with the Union while it was attempting to undermine its status as bargaining representative by sponsoring a decertification

petition; by soliciting employees to bypass the Union and present grievances directly to the Company; by bypassing the Union and bargaining directly with individual employees on the subject of the amount of deductible payments on health insurance; by refusing to bargain with the Union and by withdrawing recognition from the Union as the bargaining representative in the unit described above in Conclusion of Law Number 3; and by refusing to furnish the Union with information relevant to the performance by the Union of its function as bargaining representative, namely the wage rates of unit employees, the Respondent herein has violated Section 8(a) (5) of the Act.

6. By the conduct described above in Conclusion of Law Number 5; by soliciting and encouraging employees to file a decertification petition; and by promising benefits to employees if they should vote to decertify the Union, the Respondent herein violated Section 8(a) (1) of the Act.

7. The unfair labor practices set forth in Conclusions of Law Numbers 5 and 6 have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Sections 2(6) and 2(7) of the Act.

III. Remedy

Having found that the Respondent herein has committed various unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take other affirmative actions designed to effectuate the purposes and policies of the Act. Since the violations of the Act found herein were calculated, repeated, and pervasive, and demonstrate on the part of this Respondent a disposition to behave in total disregard for the rights

of its employees, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress any and all violations of the Act. *Hickmott Foods, Inc.*, 242 NLRB 1357. I will recommend that the Respondent be required to recognize and bargain collectively in good faith with the Union as the representative of its optical lab employees and, if an agreement is reached, to embody that agreement in a signed, written document. I will also recommend that the Respondent post the usual notice, advising its employees of their rights and of the results of this case.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record herein considered as a whole, and pursuant to Section 10(c) of the Act, I make the following recommended:[10]

ORDER

Respondent Weisser Optical Company and its officers, supervisors, successors, and assigns, shall:

1. Cease and desist from:

(a) Withdrawing recognition from and refusing to bargain collectively in good faith with Local 853, United Optical Workers Union, as the exclusive collective bargaining representative of its optical laboratory employees.

(b) Refusing, upon requeest, to furnish the Union the wage rates of unit employees or any other informa-

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[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tion which is relevant to the Union's responsibility as bargaining representative.

(c) Bypassing the Union by soliciting grievances from employees or by bargaining directly with employees over the amount of deductible coverage by health insurance policies or any other matter respecting wages, hours, or terms and conditions of employment.

(d) Sponsoring the filing of a decertification petition, urging employees to support the decertification of the Union as their bargaining agent, or promising employees benefits if they vote to decertify the Union.

(e) By any other means or in any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative actions which are designed to effectuate the purposes and policies of the Act:

(a) Recognize and bargain collectively in good faith with respect to wages, hours, and terms and conditions of employment with Local 853, United Optical Workers Union, as the exclusive collective bargaining representative of all of the Respondent's optical laboratory employees, exclusive of superintendents, managers, and other supervisors as defined in the Act, and, if agreement is reached, embody the same in a written, signed document.

(b) Furnish the Union with a complete and current list of all bargaining unit employees, together with their individual rates of pay before and after April 30, 1984.

(c) Post at its Peoria, Arlington Heights, and Moline, Illinois, laboratories copies of the attached notice

marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 33, after being duly signed by a representative of the Respondent, shall be posted immediately upon receipt thereof and shall be maintained by the Respondent for sixty consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 33, in writing, within twenty days from the date of receipt of this Order what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. September 6, 1984.

/s/ Walter H. Maloney, Jr.
Administrative Law Judge

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[11] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition from Local 853, United Optical Workers Union, as the exclusive collective-bargaining representative of our laboratory employees at our Peoria, Moline, and Arlington Heights laboratories.

WE WILL bargain collectively with that Union as the exclusive collective-bargaining representative of those employees and, if an agreement is reached, we will embody that agreement in a written, signed document.

WE WILL NOT sponsor the filing of a decertification petition. WE WILL NOT unlawfully urge bargaining unit employees to support the decertification of the Union as their bargaining agent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act. These rights include the right to form, join, or assist labor organizations, to bargain collectively through representatives

of their own choosing, and to engage in other concerted activities for their mutual aid and protection.

WE WILL furnish the Union with data pertaining to the wage rates of bargaining unit employees both before and after 30 April 1984, and WE WILL NOT refuse to furnish the Union with any requested data which is relevant to its responsibility as bargaining agent for our employees.

WEISSER OPTICAL COMPANY

.....

(Employer)

Dated.....By.....

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Savings Center Tower, 16th Floor, 411 Hamilton Boulevard, Peoria, Illinois 61602, Telephone 309—671—7068.

NLRB JUDGMENT — WITHOUT ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

March 25, 1986

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Nos. 85-1575, 85-1855

WEISSER OPTICAL COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Review of an Order of the National Labor Relations Board and Cross-Application to Enforce an Order of the National Labor Relations Board.

This cause came before the Court for decision on the record from the National Labor Relations Board.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that enforcement of the order of the National Labor Relations Board reviewed in this matter be, and the same is hereby, GRANTED, with costs, in accordance with the order of this Court entered this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
May 15, 1986

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

No. 85-1575, 85-1855

WEISSER OPTICAL COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Review of an Order of the National Labor Relations Board and Cross-Application to Enforce an Order of the National Labor Relations Board

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by petitioner, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

June 9, 1986

Before

Hon. JOEL M. FLAUM, Circuit Judge
Hon. .....
Hon. .....

Nos. 85-1575, 85-1855

WEISSER OPTICAL COMPANY,
Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner.

Petition to Review, and Cross-Application to Enforce, an Order of the National Labor Relations Board

This matter comes before the Court on "PETITIONER'S MOTION TO STAY EXECUTION OF JUDGMENT ENFORCING A DECISION OF THE NATIONAL LABOR RELATIONS BOARD," filed herein on May 22, 1986.

The March 25, 1986 order of this Court reflected application of settled doctrines of law. We can thus find no issue meriting Supreme Court review. Accordingly,

IT IS ORDERED that the motion to stay execution of the judgment is hereby DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-7106

NLRB No. 32-CA-2812

32-CA-3009

Hotel, Motel and Restaurant Employees and Bartenders Union Local No. 19, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO,

Petitioners,

v.

National Labor Relations Board,

Respondent.

Burger Pits, Inc., and Self Serv Food Corp., Inc.,

Intervenor-Respondent.

OPINION

Argued and Submitted

November 13, 1985—San Francisco, California

Filed March 25, 1986

Before: Joseph T. Sneed, Anthony M. Kennedy and Robert Boochever, Circuit Judges.

Opinion by Judge Boochever

Appeal from the National Labor Relations Board

SUMMARY

Labor

Petition for review of a decision of the National Labor Relations Board (NLRB) holding that Burger Pits, Inc. did not violate sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act by withdrawing recognition from and refusing to bargain with the Hotel, Motel, Restaurant Employees and Bartenders Union, Local 19. Affirmed.

A collective bargaining agreement between the parties was effective through May 31, 1980 and was extended through June 30, 1980. After May 31, Burger Pits refused to grant Union representatives access to kitchen areas, although no evidence was submitted that any representatives sought access. There were 276 employees in the bargaining unit. On June 3, 1980 a relief cook presented to Burger Pits a petition with 180 signatures stating that the signers no longer wished to be represented by the Union. Burger Pits then sent notice that it no longer recognized the Union as the bargaining representtive. The NLRB upheld an ALJ's conclusion that Burger Pits had violated sections 8(a)(1) and 8(a)(5) but found that Burger Pits had a good faith reasonable doubt of the Union's majority status. The NLRB refused to enforce the order to bargain. It further held that a make-whole remedy was appropriate for the contract period but not beyond.

[1] A good faith defense to a refusal to bargain requires the employer to present clear, cogent, and convincing evidence of (1) a reasonable good faith doubt of ma-

jority status (2) in a context free of employer activities aimed at causing disaffection. [2] Here the NLRB correctly applied the presumption of continuing majority support. [3] The existence of an unfair labor practice prior to the withdrawal of recognition does not necessarily mean that an employer's action was in bad faith. [4] The lack of access to the kitchen areas here did not "taint" the employee petition, which was the grounds for Burger Pits' good faith doubt of continuing majority support.

[5] Because Burger Pits presented sufficient evidence to rebut the presumed majority status in a context free of activities aimed at causing disaffection and the General Counsel failed to present evidence establishing that the employees' petition was tainted by Burger Pits' unfair labor practice, the NLRB properly found that Burger Pits had a good faith defense to charges of refusal to bargain. [6] The employee petition constituted clear and convincing evidence on which the employer could base a reasonable good faith belief that the Union had in fact lost majority support. [7] Other factors as well supported the good faith doubt.

COUNSEL

Van Bourg, Weinberg, Roger & Rosenfeld, and David Rosenfeld and William A. Sokol, San Francisco, California, for the petitioners.

William Stewart, NLRB, Washington, D.C., for the respondents.

Luken, St. Peter & Cooper, and Susan Ardissan and M. Armon Cooper, San Francisco, California, for the intervenor-respondent.

OPINION

BOOCHEVER, Circuit Judge:

We review the NLRB decision that Burger Pits, Inc. did not violate sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and 158(8)(a)(5) (1982), by withdrawing recognition from and refusing to bargain with the Hotel, Motel, Restaurant and Bartenders Union, Local 19 (Union). The Union asks us to review (1) whether the NLRB correctly applied the law regarding the presumption of continuing majority support for a union and an employer's good faith doubt of that support and (2) whether the NLRB's finding that Burger Pits had a good faith reasonable doubt of the Union's continuing support is sustained by substantial evidence in the record. We find that the NLRB correctly applied the law and that the record supports its findings of fact.

I. FACTS

Hotel, Motel, Restaurant Employees and Bartenders Union, Local 19 (Union) represented Burger Pits employees. Burger Pits entered into successive collective bargaining agreements with the Union, the most recent of which was effective through May 31, 1980. On May 29, 1980, Burger Pits and the Union agreed to extend the contract through June 30, 1980.

Under the contract, Union representatives had the right to enter the kitchen areas of Burger Pits facilities to investigate employee status and work conditions. After May 31, however, Burger Pits refused to grant Union representatives access to the kitchen areas. No evidence was

submitted, however, that any Union representatives sought access.

As of June 1, 1980, Burger Pits employed 276 employees in the bargaining unit. Between June 1 and June 3, relief cook Turrick Robbins collected 180 signatures on an employee petition which stated that the signers "no longer wish[ed] to be represented by the [Union]." Robbins presented the petition to Burger Pits Vice President Albert Berger on June 3, 1980. When he presented the petition, Robbins told Berger that he had collected the signatures on his own initiative and that the employees "willingly signed the petition" at "almost every location."

Berger contacted his attorney who, on June 6, sent to the Union written notice that Burger Pits no longer recognized the Union as the employees' bargaining representative. After June 6, but before the expiration of the contract on June 30, Burger Pits unilaterally instituted new health and welfare coverage and ceased making the contractually required contributions to the existing health and welfare fund and pension plan.

On June 16, 1980, the Union filed an unfair labor practice charge, alleging that Burger Pits had violated Sections 8(a) (1) and 8(a) (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), 158(a)(5) (1982). The Union alleged Burger Pits had locked out Union representatives, unilaterally changed terms and conditions of employment during the term of the contract extension, and refused to recognize and bargain with the Union.

The Administrative Law Judge decided that Burger Pits had engaged in unfair labor practices and ordered a broad "make-whole" relief and a bargaining order. Burger Pits sent its Exceptions to the ALJ's decision to the NLRB.

On December 14, 1984, the NLRB upheld the ALJ's Conclusion of Law that Burger Pits had violated sections 8(a)(1) and 8(a)(5) but found that Burger Pits had a good faith reasonable doubt of the Union's majority status. The NLRB refused to enforce the order to bargain. It further held that because Burger Pits had failed to recognize the Union for purposes of its contract obligations a make-whole remedy was appropriate for the contract period but not beyond.

The Union appealed, alleging that the NLRB failed to apply correctly the presumption of a union's continuing majority support, and that the record failed to provide substantial evidence sufficient to justify a finding that Burger Pits had a good faith doubt of the Union's majority support.

II. STANDARD OF REVIEW

A court reviewing an NLRB decision looks to see "if the Board correctly applied the law" and determines "if the Board's findings of fact are supported by substantial evidence on the record viewed as a whole." *Whisper Soft Mills, Inc. v. NLRB,* 754 F.2d 1381, 1384 (9th Cir. 1985). Although a reviewing court reviews questions of law de novo it should give considerable deference to the Board's expertise in construing and applying the labor laws. *United States v. McConney,* 728 F.2d 1195, 1202 (9th Cir.) (en banc), *cert. denied,* 105 S.Ct. 101 (1984); *Mingtree Restaurant, Inc. v. NLRB,* 736 F.2d 1295, 1297 (9th Cir. 1984). Thus, with some deference to the NLRB, we review de novo whether the NLRB correctly applied the presumption of a union's majority status.

With respect to questions of fact, however, the NLRB's findings are conclusive if supported by substantal evidence in the record considered as a whole. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 484-88 (1951). Thus, in reviewing whether the NLRB's finding that Burger Pits had a good faith doubt of the Union's continuing majority support, we look to the record for substantial evidence.

III. ANALYSIS

A. *The NLRB correctly applied the law regarding a union's presumption of continuing majority support and an employer's good faith doubt of that support.*

As long as a union is certified or voluntarily recognized, the employer has a duty to bargain. A refusal to bargain is a violation of section 8(a) (1) and 8(a) (5). Once a union is certified or recognized it enjoys a presumption of continued majority status which is irrebuttable for a reasonable time, usually one year, and is rebuttable thereafter. An employer may rebut the presumption of continued majority status if it shows by clear, cogent, and convincing evidence that the union was in the minority or that the employer had a good faith reasonable doubt of majority status. *See Brooks v. NRLB,* 348 U.S. 96, 104 (1954); *Mingtree Restaurant,* 736 F.2d at 1296-97. The reasonable doubt must be asserted in good faith and may not be raised in the context of any employer activities aimed at causing disaffection with the union. *NRLB v. Carilli,* 648 F.2d 1206, 1216 (9th Cir. 1981); *Clear Pine Mouldings, Inc. v. NLRB,* 632 F.2d 721, 730 (9th Cir. 1980), *cert. denied,* 851 U.S. 984 (1981).

Once the employer has presented sufficient evidence to rebut the presumed majority status, "the General Coun-

sel must come forward with the evidence that on the refusal to bargain date the union in fact did represent a majority of employees . . . or that the refusal to bargain was not predicated upon a good faith and reasonably grounded doubt of the union's continued majority status." *National Cash Register v. NLRB,* 494 F.2d 189, 194 (8th Cir. 1974); *accord NLRB v. Sacramento Clinical Laboratory, Inc.,* 623 F.2d 110, 114 (9th Cir. 1980); *NLRB v. Silver Spur Casino,* 623 F.2d 571, 577 (9th Cir. 1980), *cert. denied,* 452 U.S. 906 (1983). If the General Counsel presents evidence showing that the union's decline in support was attributable to the employer's misconduct, the employer's claim of a good faith reasonable doubt fails. Absent such evidence, the employer prevails. *See NLRB v. Sacramento Clinical Laboratory,* 623 F.2d at 114; *Dalewood Rehabilitation Hospital, Inc. v. NLRB,* 566 F.2d 77, 80 (9th Cir. 1977).

[1] Thus, a good faith defense to a refusal to bargain charge requires the employer to present clear, cogent, and convincing evidence of (1) a reasonable good faith doubt of majority status (2) in a context free of employer activities aimed at causing disaffection. If the General Counsel then fails to come forward with a rebuttal, the NLRB must find that the employer has a good faith defense.

[2] With regard to Burger Pits, the NLRB correctly applied the presumption of continuing majority support. The Union, however, alleges that the NLRB failed to recognize that Burger Pits had violated the second requirement of the good faith defense and, with regard to that issue, the NLRB improperly shifted the burden of proof to the Union. The Union maintains that the employer's defense is tainted and without merit because Burger Pits locked out union

representatives at the time signatures were obtained on Robbin's petition.

[3] The existence of an unfair labor practice prior to the withdrawal of recognition, however, "does not necessarily mean that an employer's action is in bad faith." *NLRB v. Nu-Southern Dyeing & Finishing, Inc.*, 444 F.2d 11, 15-16 (4th Cir. 1971). Rather, the activity must be of such a character "as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *Guerdon Industries, Inc.*, 218 NLRB 658, 661 (1975). *See also Nu-Southern Dyeing & Finishing*, 444 F.2d at 16 (the unfair labor practice must 'significantly contribute to [the] loss of majority or to the factors upon which a doubt of such a majority is based").

[4] Consistent with these principles, the NLRB found that lack of access to the kitchen areas after May 31 did not "taint" the employee petition which was the grounds for Burger Pits' good faith doubt of continuing majority support. The NLRB concluded:

> The [ALJ] found that after 31 May the Respondent unlawfully refused to grant union representatives access to its kitchen areas. We note that this misconduct began prior to the submission of the petition on 3 June, and prior to employee Robbins' collection of the signatures between 1 and 3 June. However, we think it clear that this misconduct was unrelated to the massive disaffection with the Union which the petition reflects. We conclude that this unfair labor practice "was not of such a character as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." (Footnote omitted)

The company's vice president's testimony supports the NLRB's conclusion; it reveals a brewing discontent with the Union which was neither connected with nor caused by the company's lockout. As early as March, 1980, most of the employees were not paying dues and "just weren't in favor of the Union." Further, during the year or two prior to the withdrawal of recognition, Union representatives had not visited most of the company's facilities. No evidence was submitted that any union representative sought access during the period of the lockout. Thus, the record supports a finding that the lock-out on May 31 did not taint the employee petition.

[5] The NLRB therefore recognized and correctly applied the presumption of a continuing majority status. The Union's argument that the Board improperly applied the presumption because it shifted the burden to the Union fails to recognize that under the proper application, the burden does shift once the employer rebuts the presumption. Because Burger Pits presented sufficient evidence to rebut the presumed majority status in a context free of activities aimed at causing disaffection and the General Counsel failed to present evidence establishing that the employees' petition was tainted by Burger Pits' unfair labor practice, the NLRB properly found that Burger Pits had a good faith defense to charges of refusal to bargain.

B. *The NLRB's finding that Burger Pits had a good faith reasonable doubt of the Union's continuing majority support is sustained by substantial evidence in the record.*

Evidence presented to establish an employer's good faith doubt of continuing majority support must unequivocally indicate that a union's support has declined to a minor-

ity. *Mingtree Restaurant,* 736 F.2d at 1297. Evidence presenting only an ambiguous inference of a lack of majority support is not enough. *N.T. Enloe Memorial Hospital v. NLRB,* 682 F.2d 790, 795 (9th Cir. 1982). A petition signed by half of the members of a bargaining unit and urging employers to withdraw recognition of the union, however, is sufficient evidence that the union has lost its majority support. *Sacramento Clinical Laboratory,* 623 F.2d at 114 (petition established loss of majority); *Industrial Waste Service, Inc.,* 268 NLRB 1180, 1186 (1984) (petition gave employer good faith doubt); *Master Slack Corp.,* 271 NLRB 78, 85 (1984) (petition established actual loss of majority).

[6] Thus, the employee petition presented to Vice President Berger by employee Robbins constituted clear and convincing evidence on which the employer could base a reasonable good faith belief that the Union had in fact lost majority support. The petition stated that the signers "no longer wish to be represented by [the Union]". The petition alone is sufficient support for a finding that Burger Pits had a good faith doubt in the Union's continuing majority support.

The Union, however, alleges that the petition is not clear, cogent, and convincing evidence because Burger Pits offered no evidence (1) that the signatures were actually those of employees in the bargaining unit; (2) regarding the number of employees in the unit; and (3) concerning the circumstances surrounding the circulation of the petition.

The Union's allegations are without merit. Although the Union received the opportunity to challenge the peti-

tion's authenticity when it was put into evidence, the Union failed to raise the issue. Further, Berger testified that employee Robbins told him that he had personally collected the signatures on his own initiative and that the employees willingly signed the petition. Berger testified that 276 employees were in the bargaining unit and that testimony was unchallenged. No evidence was presented to show that management was involved with, or even aware of, the petition prior to June 3 when Robbins presented it to Berger. Under these circumstances, the NLRB could find that the petition constituted clear and convincing evidence.

[7] Even if an employee petition alone were not sufficient, the record discloses that Burger Pits' good faith doubt in the Union's majority support was based on other factors as well: (1) Robbins' statement that the petition was signed willingly at almost every location he visited; (2) reports that "most of the busboys and dishwashers would not join the Union" for "at least a year, or maybe two"; (3) no union business agent had visited ten of the Burger Pits' fifteen restaurants for a long period; (4) of sixteen employees at one location, only one was a Union member; and (5) of seventeen employees at another location, only two were Union members.

Thus, because an employee petition constitutes evidence sufficient to support a finding of good faith belief that a union has lost majority support and because other factors indicate the Union had lost majority support, the NLRB's finding that Burger Pits had a good faith reasonable doubt of the Union's continuing majority support is supported by substantial evidence in the record.

IV. CONCLUSION

The NLRB correctly applied the burden of proof regarding the presumption of a union's continuing majority support. Burger Pits' good faith doubt of the Union's majority status is supported by substantial evidence in the record. Therefore, the order of the NLRB is AFFIRMED.

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the First Amendment to the Constitution of the United States are as follows:

* * *

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE, PETITION OF GRIEVANCES

Congress shall make no law . . . abridging the freedom of speech . . .

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et. seq.*, are as follows:

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

* * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

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No. 85-2097

In the Supreme Court of the United States

OCTOBER TERM, 1986

WEISSER OPTICAL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether in the circumstances of this case the Board properly found that petitioner's encouragement of its employees to file a decertification petition precluded its reliance on the petition to support a good faith doubt of the certified bargaining agent's continuing majority status.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is not officially reported. The decision and order of the National Labor Relations Board (Pet. App. A11-A23) are reported at 274 N.L.R.B. No. 143.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1986, and a timely petition for rehearing was denied on May 15, 1986 (Pet. App. A52). The petition for a writ of certiorari was filed on June 18, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner's 22 optical shop and stock department employees, about 17 of whom work in Peoria (Pet. App. A2), have been represented by Local 853 of the United

Optical Workers Union for many years. In April 1983, petitioner entered into its latest collective bargaining agreement with the union, which expired in April 1984 (Pet. App. A11, A26-A27). Prior to the expiration of the contract, petitioner's owner, Philip Hirsch, asked Ken Ratcliff, an employee at petitioner's Peoria laboratory, to initiate an effort to decertify the union. Hirsch told Ratcliff that " 'we have to do something. The Union is killing me. I can't compete.' " *Id.* at A12, A27. Ratcliff suggested that Hirsch get someone else, but Hirsch replied that he wanted Ratcliff because of his rapport with the other employees (*ibid.*). During this meeting, which was also attended by laboratory director Sallie Homan, Ratcliff was given a booklet entitled "Union Decertifications," which contained detailed instructions on how companies could oust incumbent unions (*ibid.*). Attached to the booklet was a model "showing of interest" form for employees to use in preparing a decertification petition for the National Labor Relations Board (*id.* at A27).[1] That same evening, Ratcliff met with other laboratory employees to decide whether they desired to decertify the union. The assembled employees decided not to take any action to decertify the union (*id.* at A12, A27).

In early February 1984, Homan, who was then Ratcliff's immediate supervisor, told him that Hirsch had advised her that " 'it was getting close to th[at] time,' " referring to the " 'open period' " under the Board's rules when a decertification petition could be filed during the term of a collective bargaining agreement.[2] In mid-February, Homan asked

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[1]At least 30% of the employees in a bargaining unit must sign such a "showing of interest" form before the Board will direct an election to determine if a majority of the employees no longer desire to be represented by the union. See 29 C.F.R. 101.17, 101.18.

[2]The period here was February 1 to March 1, 1984 (Pet. App. A12 n.1).

Ratcliff to return the booklet on decertification he had been given the previous year. Homan also had two conversations with employee James Menees concerning Hirsch's desire to get a decertification effort started. Pet. App. A12-A13.

On February 24 Hirsch called a meeting of all the Peoria laboratory employees. Homan and controller David Lloyd were also present. Homan stated that she had received questions concerning employee benefits if the union were voted out, and Hirsch and Lloyd then discussed benefit options that might be available. Pet. App. A13, A29-A30. Hirsch concluded the meeting by telling the employees that they were mature enough to work out any differences with him without the intervention of a "third party," by which Hirsch meant the union (*id.* at A13, A30).

Shortly after the meeting concluded, Ratcliff began circulating copies of the "showing of interest" form he had made from the model in the booklet petitioner had given him. Copies of the form were also sent to unit employees at petitioner's two other laboratories and returned through the inter-office delivery system. On February 28, Ratcliff filed with the Board a decertification petition accompanied by "showing of interest" forms signed by 18 unit employees. Pet. App. A30.

The union filed unfair labor practice charges against petitioner concerning the decertification effort, and the Board subsequently issued an unfair labor practice complaint based on those charges and dismissed the decertification petition. Nevertheless, petitioner withdrew recognition from the union, claiming a good faith doubt as to the union's majority status based on the decertification petition. Thereafter, petitioner refused to bargain with and supply relevant information to the union. Pet. App. A34-A36.

2. The Board agreed with the administrative law judge that petitioner "unlawfully sponsored and encouraged the decertification effort" (Pet. App. A12). The Board found that "the idea of decertification was implanted in the employees' minds by [petitioner]" (*id.* at A14) and noted that "Homan's unsolicited remarks to Ratcliff were, in essence, a renewal of Hirsch's earlier expressed request that Ratcliff file a decertification petition" (*id.* at A13). It also noted that Homan's comments to Menees and Hirsch's statements at the February 24 meeting constituted coercive pressure on employees to engage in a decertificaton effort (*id.* at A13, A14 & n.5). The Board further found that the employee petition was tainted by petitioner's unlawful conduct, and that petitioner therefore could not rely on it in asserting a good faith doubt as to the union's majority status. Accordingly, the Board concluded that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with and to supply information to the Union. Pet. App. A12, A14-A15.[3] The Board entered an appropriate remedial order (*id.* at A18-A20).

3. The court of appeals, by unpublished order, upheld the Board's decision and enforced its order (Pet. App. A1-A10). The court concluded that substantial evidence supported the Board's finding that petitioner violated the Act by encouraging the instigation of the decertification process. The court further agreed with the Board that petitioner's sponsorship of the decertification petition precluded reliance on it to establish a good faith doubt of the union's continuing majority status. *Id.* at A9-A10. The court stated that a "causal relation" between the unlawful employer

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[3]The Board rejected the administrative law judge's further findings that petitioner had unlawfully promised benefits to the employees and bargained with and solicited grievances from them directly (Pet. App. A15-A18).

encouragement and the actual filing of a decertification petition need not be shown to taint the petition and preclude reliance on it (*id.* at A8); rather, it need only be shown that the employer's conduct "reasonably tended" to cause the petition to be filed (*id.* at A10). However, the court also found that the Board did not err in concluding that the facts here established a causal connection between petitioner's actions and the filing of the decertification petition (*id.* at A7-A8).[4]

ARGUMENT

Petitioner does not dispute the Board's finding, upheld by the court of appeals, that it violated the Act by encouraging its employees to file a decertification petition. And petitioner acknowledges (Pet. 7) that an employer may not rely on a decertification petition as evidence of the bargaining agent's loss of majority status where the employer's unlawful conduct has tainted the petition. Petitioner contends, however, that the court of appeals erred in requiring only a showing that the employer's conduct "reasonably tended to encourage decertification" (Pet. App. A10), rather than a showing of "a demonstrable nexus between the employer's actions and employee disaffection for the union" (Pet. 7).[5]

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[4]The court of appeals denied petitioner's motion for a stay of the judgment pending the filing of the instant petition (Pet. App. A53-A54). On June 13, 1986, Justice Stevens denied petitioner's application for a stay directed to this Court.

[5]Petitioner also contends (Pet. 8-10) that the Board and the court improperly relied on Hirsch's statement that he and his employees could work out their differences without the intervention of a "third party" in finding that the decertification petition was tainted. That issue is not properly presented. Petitioner never contended before the Board that Hirsch's remarks were privileged by Section 8(c) of the Act, 29 U.S.C. 158(c), and, accordingly, that contention may not be raised here. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666

There is no need in this case to determine whether employer encouragement of a decertification petition taints the petition in the absence of a causal nexus between the encouragement and the filing of the decertification petition. The Board here found that "the idea of decertification was implanted in the employees' minds by the [petitioner]" (Pet. App. A14), and the court below agreed that the decertification petition would not have been filed without petitioner's actions (Pet. App. A8). Accordingly, even if a "demonstrable nexus" were required, such a showing has been made here, as the court of appeals recognized.

Moreover, the decision of the court below is consistent with the uniform holdings of other courts of appeals that an employer cannot rely on a decertification petition which it instigated in asserting a good faith doubt of the bargaining agent's continuing majority status. See, *e.g., NLRB* v. *Maywood Plant of Grede Plastics*, 628 F.2d 1, 6 (D.C. Cir. 1980); *NLRB* v. *Sky Wolf Sales*, 470 F.2d 827, 830 (9th Cir. 1972); see also *Texaco, Inc.* v. *NLRB*, 722 F.2d 1226, 1235-1236 (5th Cir. 1984). The Ninth Circuit's decision in *Hotel Employees Local 19* v. *NLRB*, 785 F.2d 796 (1986) (Pet. App. B1-B13), is not to the contrary. In that case, the Board, upheld by the court of appeals, rejected the assertion that the employer's previous unlawful denial of access to

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(1982). Indeed, petitioner raised the objection concerning Section 8(c) before the court of appeals only in its petition for rehearing.

In any event, there is no merit to petitioner's assertion that Hirsch's statements were statements of opinion privileged by Section 8(c). In *Indiana Cabinet Co., Inc.*, 275 N.L.R.B. No. 169 (July 25, 1985), slip op. 3-4, the Board held that an employer's accurate summary to employees of Board decertification procedures is permitted by Section 8(c). However, the Board emphasized that the employer there did not request the employees to start a decertification effort. Here, in contrast, the Board found that Hirsch's statements were "an aspect of [its] unlawful sponsorship and encouragement of the decertification petition" (Pet. App. A14 n.5).

union agents to its premises contributed to the employee disaffection that prompted the employees' effort to seek decertification (*id.* at B9-B10). The court of appeals stressed (*id.* at B12) that, in contrast to this case, the decertification effort in *Hotel Employees Local 19* originated with the employees and management was not even aware of the decertification petition until it was presented to the company.[6]

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[6]In *NLRB* v. *Nu-Southern Dyeing & Finishing, Inc.*, 444 F.2d 11, 16 (4th Cir. 1971), the court found that the employer's statement that the employees were not receiving adequate representation for the dues they were paying was "no more than a technical violation of § 8(a)(1) * * * [in light of the facts that the employer] was specific in telling the employees that the ultimate decision concerning the petition was their own and that under no circumstances was company time or property to be involved." That case, therefore, is also clearly distinguishable from this one.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

REPLY TO BRIEF IN OPPOSITION

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WEISSER OPTICAL COMPANY

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NATIONAL LABOR RELATIONS BOARD

Respondent.

REPLY TO BRIEF IN OPPOSITION

The Board contends (br., p. 6) that certiorari should be denied because the decision below is "consistent with" a "uniform" case law holding that employers cannot taint a union decertification petition, and then rely on that petition to assert a good faith doubt that the union continues to enjoy majority status. This contention, however, begs the critical questions raised by this case: *first,* what is the

correct standard by which employer "taint" of a decertification petition is to be measured and, *second*, may employer "free speech" properly be considered as evidence that a decertification petition has been unlawfully tainted.

1. The Board mischaracterizes the question presented. It presumes that *any* casual relationship, however attenuated, between an employer's statements and an employee decertification petition fatally taints that petition. None of the decisions cited by the Board, apart from the "reasonable tendency" test adopted for the first time by the court below, support this sweeping proposition. The critical issue before this Court is thus the *degree* of causal relationship required to unlawfully taint a decertification petition. Is the correct standard the Seventh Circuit's "reasonable tendency" criterion or the more stringent "significant contribut[ion]" test of the Ninth and Fourth Circuits?

The error of the Board's view is further evidenced by its claim that the Company "does not dispute . . . that it violated the Act *by encouraging . . . a decertification petition.*" (br., p. 5 (emphasis added).) The Company has made no such concession. The Company has repeatedly contended, and the court below agreed, that "not all violations of [the NLRA] necessarily taint decertification petitions to the extent that there can be no possibility of a good faith reliance on the petition evidencing a lack of majority union support." (Pet. App. A, A-8.) Accordingly, even if the management actions here were unlawful and could be shown to have some nexus to the decertification petition, those findings would not, as the Board argues, complete the requisite analysis. The Board would

still have to determine whether the employer's conduct was sufficient to have "*significantly contribute*[*d*] to [the] loss of majority or to the factors upon which a doubt of such majority [was] based." *Hotel, Motel and Restaurant Employees Local 19*, 785 F.2d 796, 799 (9th Cir. 1986) quoting *NLRB v. Nu-Southern Dyeing & Finishing*, 444 F.2d 11, 16 (4th Cir. 1971) (emphasis added). Neither the Board nor the court below addressed this question. As a result, while the Company's refusal to bargain was unlawful in the Seventh Circuit where there is no "significant contribution" test, it may likely have been perfectly legitimate in the Fourth and Ninth Circuits. That is the critical conflict presented.

Employer conduct *vis-a-vis* a decertification effort lies on a continuum from silence to rampant threats and promises. The test for establishing employer "taint" of a decertification petition must be clearly demarcated on this continuum in order to provide guidance to employers seeking to act within the bounds of federal labor law. Review by this Court is warranted, therefore, to close the chasm between the "reasonable tendency" test applied below and the "significant contribut[ion]" test of the Ninth and Fourth Circuits.

2. Contrary to the Board's claim (br., p. 5, n. 5), the question of whether Company owner Hirsch's remark that he and the employees could work out their differences without a "third party" was privileged by Section 8(c) of the Act and the First Amendment is properly before this Court. It is not barred by Section 10(e) of the

NLRA.[1] Here, the principal issue before the Board's Administrative Law Judge, the Board itself, and the court below has always been the same—whether the Company engaged in conduct which so tainted its employees' decertification effort as to preclude the Company from asserting a good faith doubt as to the Union's continued majority status. Hirsch's comment was treated by both the Board (Pet. App. A, A-14) and the court below (Pet. App. A, A-9), contrary to the Company's position, as evidence that the Company violated Section 8(a)(5) of the Act. As the court below found with respect to a similar contention of the Board, the Company did not waive this issue (Pet. App. A, A-8, n. 5).

Moreover, the Board has again put the cart before the horse by asserting (br., p. 5, n. 6) that Hirsch's statement somehow "lost" its 8(c) privilege by virtue of the Board's finding that the "third party" remark was "an aspect of [the Company's] . . . sponsorship and encouragement of the decertification petition." It is beyond cavil that Section 8(c) "protects the right of an employer to state its view, arguments, or opinion" about a union. *Roper Corp. v. NLRB*, 712 F.2d 306, 311 (7th Cir. 1983); *Dow Chemical Co. v. NLRB*, 660 F.2d 637, 644 (5th Cir. 1981). The protection of Section 8(c) and the employer's "First Amendment right to communicate his views to his

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[1] Section 10(e) precludes a reviewing court from considering objections that have not been urged before the Board absent a showing of extraordinary circumstances. 29 U.S.C. § 160(e). The purpose of this rule is to ensure that the Board has an opportunity to resolve all issues properly within its jurisdiction and to prevent repetitive appeals to the courts. *Local 900, I.U.E. v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984).

employees" (*Roper Corp.*, 712 F.2d at 311 and cases cited therein) do not disappear simply because an employee may be swayed by those views. Where, as here, there is no finding that the employer's statement of his opinion contained any "threat of reprisal or force or promise of benefit," Section 8(c) mandates that the statement "shall not constitute or be evidence of an unfair labor practice." 29 U.S.C. § 158(c).

3. Absent reliance upon Hirsch's lawful expression of his views, the only "evidence" that the Company tainted the employees' decertification petition consists of a first-line supervisor's casual and isolated remarks to two long-time friends and co-workers.[2] This evidence cannot form the basis for a conclusion that petitioner "significantly contributed" to the loss of majority support. Accordingly, this Court should grant certiorari to correct the lower court's mistaken view of Section 8(c) and to resolve an undesirable disharmony between the Circuits on a significant question of labor management relations—the test for

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[2] The Board's presentation of the facts clouds the paucity of employer misconduct alleged in this case. In its "Statement" (br., pp. 1-2), the Board attributes to the period preceding *expiration* of the 1983-1984 collective bargaining agreement a course of conduct occurring a year earlier, prior to that agreement's *execution*. This conduct, of course, cannot be evidence of the unfair labor practices at issue because it occurred well before the statutory limitations period. *See* 29 U.S.C. § 160(b).

establishing employer "taint" of a decertification petition.[3]

Respectfully submitted,

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[3] According to the 47th Annual Report of the National Labor Relations Board, 1,964 decertification petitions were filed during the Board's fiscal year ended September 30, 1982. For that year, decertification petitions accounted for over 20% of the representation and related cases before the Board. LLR (Extra Edition), Report 733, March 11, 1986 at page 11.